

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In re M&T Bank Corporation ERISA Litigation

Civil Action No.: 1:16-cv-375-FPG-JJM

Consolidated Action

**DECLARATION OF JACOB T. SCHUTZ IN SUPPORT OF PLAINTIFFS' MOTION TO
COMPEL PRODUCTION OF DOCUMENTS FROM GORDON FEINBLATT LLC**

I, Jacob T. Schutz, declare and state as follows:

1. I am an attorney at Nichols Kaster, PLLP ("Nichols Kaster"), and am one of the attorneys representing Plaintiffs in the above-captioned action. I submit this declaration in support of Plaintiffs' Motion to Compel Production of Documents from Gordon Feinblatt LLC.

2. On December 5, 2018, Plaintiffs served a subpoena on Gordon Feinblatt LLC. A true and correct copy of Plaintiffs' subpoena to Gordon Feinblatt LLC is attached hereto as **Exhibit 1**.

3. Gordon Feinblatt LLC responded with objections on December 17, 2018. A true and correct copy of Gordon Feinblatt LLC's Responses and Objections is attached hereto as **Exhibit 2**.

4. Gordon Feinblatt produced certain documents in response to Plaintiffs' subpoena on February 15, 2019.

5. Gordon Feinblatt LLC first produced privilege logs to Plaintiffs on April 11, 2019.

6. On April 24, 2019, Plaintiffs and Gordon Feinblatt LLC met and conferred regarding Gordon Feinblatt LLC's privilege logs.

7. On June 18, 2019, Gordon Feinblatt LLC provided Plaintiffs with updated privilege logs. True and correct copies of these updated privilege logs are attached hereto as **Exhibits 3 and 4.**

8. Plaintiffs wrote to Gordon Feinblatt LLC and noted several deficiencies with respect to their updated privilege logs on June 21, 2019. A true and correct copy of Plaintiffs' June 21, 2019 letter is attached hereto as **Exhibit 5.**

9. On July 12, 2019 Gordon Feinblatt LLC responded to Plaintiffs' letter and declined to unredact or produce any documents withheld as privileged that are the subject of this Motion.

10. On August 13, 2019, Plaintiffs sent a letter to the Court requesting a pre-motion conference with respect to Gordon Feinblatt's claims of privilege. A true and correct copy of Plaintiffs' letter is attached hereto as **Exhibit 6.** Gordon Feinblatt LLC Defendants responded by letters on August 21, 2019. A true and correct copy of Gordon Feinblatt's letter dated August 21, 2019 is attached hereto as **Exhibit 7.** The parties then held a telephone conference with the Court on August 27, 2019. *See ECF No. 138.*

11. Following the telephone conference with the Court, Plaintiffs requested that Defendants and Gordon Feinblatt meet and confer regarding nine documents listed on Gordon Feinblatt's privilege logs (substantially fewer documents than were the subject of Plaintiffs' pre-motion letter). A true and correct copy of Plaintiffs' email to Defendants and Gordon Feinblatt is attached hereto as **Exhibit 8.**

12. Specifically, Plaintiffs requested to meet and confer regarding: (1) documents

withheld where the subject in Gordon Feinblatt's privilege log was either "Investments in Wilmington Trust Mutual Funds" or "Wilmington Risk";¹ (2) redactions to two sets of Mr. Mellin's handwritten notes taken during Committee meetings; and, (3) a redacted list of action items for the Plan sent to the Committee's secretary.

13. Defendants declined to drop their privilege objections with respect to any of these documents. Further, Defendants declined to provide any additional information regarding the content of the disputed documents or whether the fiduciary exception applied, including whether the disputed documents concerned (1) whether proprietary Wilmington investments should be included in the Plan, (2) whether such investments should be removed, (3) whether such investments were appropriate for the Plan, or (4) how the Plan's investment lineup should be managed going forward. Similarly, Defendants refused to state whether the documents discussed specific lawsuits against M&T or involved specific threats of litigation. Accordingly, Plaintiffs indicated that they intended to bring the present motion and would ask the Court to review the documents *in camera*.

14. Attached hereto are true and correct copies or excerpts of the following documents:

Exhibit 9: Email chain ending January 4, 2017, produced by Gordon Feinblatt LLC beginning with bates number GF0001845.

Exhibit 10: M & T Bank Corporation Retirement Savings Plan 2015 Form 5500, beginning with bates number HABIB0000864.

Exhibit 11: Email from Ann Marie Odrobina, sent June 24, 2015, produced by Gordon Feinblatt LLC beginning with bates number GF0000601.

Exhibit 12: Email from Matthew P. Mellin, sent November 9, 2017, produced

¹ The "Wilmington Risk" document was sent to the Committee's secretary, Ann Marie Odrobina.

by Gordon Feinblatt LLC beginning with bates number GF0002788.

Exhibit 13: Mr. Mellin's handwritten Committee meeting notes from August 11, 2014, beginning with bates number GF0002860.

Exhibit 14: Mr. Mellin's handwritten Committee meeting notes from November 3, 2014, bates number GF0002863.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 13, 2019

/s/ Jacob T. Schutz
Jacob T. Schutz